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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN HENRY KNAPP, Arizona State Prison Inmate No. 33659, and all inmates of the Arizona State Prison similarly situated,

Petitioners,

v.

HAROLD CARDWELL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Have the courts below improperly refused to follow state law in interpreting the Arizona death penalty statute for the purpose of determining its constitutionality?

2. Is the Arizona death penalty statute as applied by the Arizona Supreme Court unconstitutional?

3. Is it a violation of the federal double jeopardy clause for the court, in a death penalty resentencing proceeding, to find "aggravating circumstances" that were expressly found not to exist at the first sentencing proceeding?

PARTIES INVOLVED*

The petitioners are James Alan Arnett, Manuel Thomas Lujan, Ronald Paul Bishop, Ronald Lee Madsen, Mitchell Thomas Blazak, Luis Mata, Richard B. Britson, Stevenson L. McDaniel, Robert Paul Brookover, Loris Lee McVay, Paris Hoyt Carriger, Ruben Melendez, Jose Jesus Ceja, Joe Morales, James Dean Clark, Willie Lee Richmond, Max Anderson Dunlap, James Albert Robison, Larry Eugene Evans, Joe Clarence Smith, Randy Greenawalt, Sylvester Smith, Jr., Douglas Edward Gretzler, Willie Luther Steelman, Wilmer G. Holsinger, Raymond Tison, Jimmie Wayne Jeffers, Ricky Tison, Paul William Jordan, Frank James Valencia, John Henry Knapp, Robert Wayne Vickers, Mark Allen Koch, Spencer Watson and all similarly situated inmates of the Arizona State Prison.

The respondents are Harold Cardwell, warden of the Arizona State Prison, and Robert K. Corbin, attorney general for the State of Arizona.

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*The petitioners listed individually were members of the class when the appeal from the district court's decision was filed. Because of the nature of the class, however, membership changes from time to time (because of deaths, successful appeals, new convictions, etc.).

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No.

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Petitioners,

v.

HAROLD CARDWELL, *et al.*,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, John Henry Knapp and all similarly situated inmates of the Arizona State Prison, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 19, 1982.[1]

[1] Counsel who participated as direct counsel in the class action have included principally the Public Defender offices of both Tucson and Phoenix. Amicus counsel for the NAACP Legal Defense Fund, and for the American Civil Liberties Union, have been permitted by the courts below to participate throughout directly, and have been involved in all arguments. In the interests of simplicity, we consolidate in this petition the positions of both the directly representative counsel and the amici.

OPINIONS BELOW

Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982) (see Appendix A).

Knapp v. Cardwell, 513 F. Supp. 4 (D. Ariz. 1980) (see Appendix B).

State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979) (see Appendix C).

JURISDICTION

This is a class action, brought in the district court under 28 U.S.C. § 2254, by 34 persons facing execution on Arizona's death row. On April 18, 1980, the district court denied the relief requested. On January 19, 1982, the Ninth Circuit Court of Appeals affirmed. A timely petition for rehearing was denied on June 28, 1982, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. 1 § 10 (see Appendix D).

U.S. Const. amend. V (see Appendix E).

U.S. Const. amend. VIII (see Appendix F).

U.S. Const. amend. XIV § 1 (see Appendix G).

Ariz. Rev. Stat. § 13-453 (see Appendix H).

Ariz. Rev. Stat. § 13-454 (see Appendix I).

Ariz. Rev. Stat. § 13-703 (see Appendix J).

1973 Ariz. Sess. Laws ch. 138 § 10 (see Appendix K).

STATEMENT OF THE CASE

We enumerate the key facts:

1. In 1973, the Arizona legislature adopted a death sentence scheme, Arizona Revised Statutes §§ 13-453 and 454, that restricted the mitigating factors that might be considered when imposing the

death sentence. An earlier version of the proposed statute that provided for unrestricted consideration of mitigating factors was rejected. Journal of the Arizona House, Thirty First Legislature, First Regular Session, p. 499.

2. On December 20, 1976, in *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 433 U.S. 915 (1977), the Arizona Supreme Court held that no other mitigating factors could be considered by the sentencing court. *Id.* at 195, 560 P.2d at 50.

3. On April 21, 1978, in *Richmond v. Cardwell*, 450 F. Supp. 519 (D. Ariz. 1978), the district court found the statute unconstitutional for "failing to allow for a consideration of relevant mitigating factors of an individual's character by the sentencing court." *Id.* at 526.

4. On July 3, 1978, this Court decided *Lockett v. Ohio*, 438 U.S. 586 (1978), and remanded an Arizona death case for further proceedings in light of *Lockett*. *Jordan v. Arizona*, 438 U.S. 911 (1978).

5. On July 20, 1978, in *State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979), the Arizona Supreme Court, relying on *Lockett*, declared Arizona Revised Statutes § 13-454(F) unconstitutional because it restricted the mitigating factors the sentencing court could consider. 120 Ariz. at 444–45, 586 P.2d at 1256–57. The court thereafter stated, "The next question then is whether the constitutional and unconstitutional portions of A.R.S. §§ 13-453 and 454 are severable so that the constitutional portion of the statute can remain in force and effect." 120 Ariz. at 445, 586 P.2d at 1257. Finding that if the legislature had been aware that the limitation on mitigating factors was unconstitutional, it "would have enacted the remainder of the statute without what is now the offending portion," the court held that "the statute with the portion deleted remains in force and effect." *Id.*

6. On November 9, 1978, the Arizona Supreme Court denied a motion for rehearing and issued a supplemental opinion, directed in part to the "SEVERABILITY OF THE STATUTE." *Id.* at 452, 586 P.2d at 1264 (emphasis in original). The court rejected the defendant's contention that "A.R.S. § 13-454, cannot be *severed*," holding, "[t]he statute, *as severed*, is valid." 120 Ariz. at 452–53, 586 P.2d at 1264–65 (emphasis added). As a result of *Watson*, all

persons previously sentenced to death were allowed to be resentenced to death under the statute as severed. *State v. Ceja*, 126 Ariz. 35, 36, 612 P.2d 491, 492 (1980).[2]

7. The judicially reconstructed death penalty statute was challenged in federal district court. On April 18, 1980, the district court concluded that while the *Watson* court may have thought it "severed" the unconstitutional portion of the statute, it had not really done so. *Knapp v. Cardwell*, 513 F. Supp. 4, 9 (D. Ariz. 1980). The district court found that instead the *Watson* court had merely reinterpreted the death penalty statute by overruling *Richmond*. *Id.* at 10–11. The district court then upheld the death penalty statute, as "reinterpreted."

8. The Ninth Circuit Court of Appeals affirmed. *Knapp v. Cardwell*, 667 F.2d 1253 (9th Cir. 1982). The court found the Arizona Supreme Court's "use of the word 'severance' . . . troublesome," but nonetheless agreed that the *Watson* court had overruled *Richmond* and reinterpreted the death penalty statute. *Id.* at 1259.

Judge Adams dissented in part because the *Watson* resentencing procedures "permit the new sentence to rest on findings of aggravating circumstances that were found, in the first sentencing proceeding, not to be present in the crime." *Id.* at 1265. Judge Adams stated that such new findings were "impermissible," *id.*, "[u]nder the standards set out in" this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981). 667 F.2d at 1269.

9. A petition for rehearing was timely filed and denied. This petition followed.

REASONS FOR GRANTING THE WRIT

1. The question is important. Because death cases are different, "this Court has gone to extraordinary measures to ensure that the

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[2] On May 1, 1979, a new death penalty statute, Arizona Revised Statutes § 13–703 (West Supp. 1981–82), directing the sentencing court to consider all mitigating factors, became effective. That statute is not challenged here.

prisoner sentenced to be executed is afforded" full protection of all constitutional guarantees. *Eddings v. Oklahoma*, 102 S. Ct. 869, 878 (1982) (O'Connor, J., concurring). *See also Gardner v. Florida*, 430 U.S. 349, 357–58 (1977) (plurality opinion); *id.*, at 363–64 (White, J., concurring). This case is uniquely different because not just one, but dozens of lives stand immediately at stake, abiding only the ruling of this Court. The sheer magnitude of the case warrants review by this Court.

2. The decisions below conflict with this Court's repeated holdings that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975); *see also Wainwright v. Stone*, 414 U.S. 21, 22–23 (1973), and cases cited; *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965), and cases cited; *Winters v. New York*, 333 U.S. 507, 514 (1948).

The problem is this: Arizona Revised Statutes § 13–454(F) listed a series of mitigating factors to be considered when imposing the death sentence. In *State v. Richmond*, 114 Ariz. 186, 195, 560 P.2d 41, 50 (1976), *cert. denied*, 433 U.S. 915 (1977), the Arizona Supreme Court held that these factors were exclusive. In *Lockett*, this Court held that there could be no such restriction, and, therefore, in *State v. Watson*, 120 Ariz. 441, 444–45, 586 P.2d 1253, 1256–57 (1978), *cert. denied*, 440 U.S. 924 (1979), the Arizona Supreme Court declared subsection (F) unconstitutional. The *Watson* court declared this section "severable" and proceeded to promulgate a new subsection (F) of the court's own making, rewriting the statute in an attempt to conform to *Lockett*. *Id.* at 445, 586 P.2d at 1257.

In the district court, the petitioners contended that the Arizona Supreme Court's severance of subsection (F) left the remainder of the statute void for vagueness and independently violated the basic eighth amendment prohibition of "severe punishments not legally authorized and not within the jurisdiction of the courts to impose." *Furman v. Georgia*, 408 U.S. 238, 376 (1972) (Burger, C. J., dissenting). Petitioners noted that the Arizona Supreme Court could not cure the *Lockett* problem by indulging in a vice more fundamentally in conflict with the eighth amendment: the judicial legislation of "illegal punishments." *Id.*

It is well established that "[f]ixing the punishment for crimes is a legislative, rather than a judicial function." *United States v.*

Cleveland, 503 F.2d 1067, 1071 (9th Cir. 1974). To be sure, the Constitution contains no strict requirement of separation-of-powers within *state* governments. But where vital Bill of Rights guarantees are jeopardized through judicial improvisation, which deprives lawmaking of both regularity and the restraint that public responsibility imposes on legislation, the result violates the Constitution. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Whalen v. United States*, 445 U.S. 684, 689–90 n.4 (1980); *Ashton v. Kentucky*, 384 U.S. 195 (1966).

As this Court has repeatedly recognized, regularity and legislative responsibility have particular significance where the punishment imposed is death. This Court has upheld only those death penalty schemes in which the sentencing determination is "circumscribed by the legislative guidelines." *Gregg v. Georgia*, 428 U.S. 153, 207 (1976). This Court also has emphasized that "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency," *Woodson v. North Carolina*, 428 U.S. 280, 294–95 (1976), which in turn are "[c]entral to the application of the [Eighth] Amendment." *Id.* at 288. *Cf. Enmund v. Florida*, 102 S. Ct. 3368, 3374 (1982) (imposition of death penalty upon the petitioner inconsistent with eighth and fourteenth amendments because, *inter alia*, "current legislative judgment . . . weighs on the side of rejecting capital punishment for the crime at issue").

The Arizona Supreme Court's assumption that the Arizona State Legislature would have wanted a constitutional statute provides no basis for creating an exception to the principles stated above. As this Court noted in *United States v. Jackson*, 390 U.S. 570, 580–81 (1968):

> It is one thing to fill a minor gap in a statute—to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality. . . . The Government . . . asks us to extend the capital punishment provision of the Federal Kidnaping Act in a new and uncharted direction, without

> the compulsion of a legislative mandate and without the benefit of legislative guidance. That we decline to do.

The Court concluded this portion of its analysis stating: "The capital punishment provision of the Federal Kidnaping Act cannot be saved by judicial reconstruction." *Id.* at 585.

Similarly, most state supreme courts properly have refused prosecutors' invitations to "rewrite" death penalty statutes to avoid constitutional infirmity because they "are matters of legislative concern." *Rockwell v. Superior Court*, 18 Cal. 3d 420, 445, 556 P.2d 1101, 1116, 134 Cal. Rptr. 650, 665, (1976). *Accord, State v. Lindquist*, 99 Idaho 766, 589 P.2d 101, 105 (1979); *French v. State*, 266 Ind. 276, 362 N.E.2d 834, 838 (1977); *Bond v. State*, 403 N.E.2d 812, 815–16, (Ind. 1980); *State v. Cline*, 397 A.2d 1309, 1311 (R. I. 1979); *Kennedy v. State*, 559 P.2d 1014, 1016–17 (Wyo. 1977). As stated by this Court in *United States v. Jackson*, 390 U.S. at 579 n.17:

> [C]ourts confronted with ["the complex problems presented by separate penalty proceedings" in capital cases] have concluded that their solution requires "comprehensive legislative and not piecemeal judicial action."

The courts below did not dispute that if in fact the Arizona Supreme Court had created a severance followed by judicial substitution, the resulting death penalty scheme would be invalid. They simply avoided this question by holding that there had been no severance, but rather an overruling of *Richmond* or a "reinterpretation" of the statute. This is in the teeth not merely of *Watson* itself but of Arizona law both generally and specifically.

The Arizona Supreme Court does not "reinterpret" prior court decisions to suit its own purposes. In *Demand v. Gordon*, 106 Ariz. 475, 478 P.2d 99 (1970), the Arizona Supreme Court held that court decisions must be strictly interpreted according to the language of the decisions themselves. In reviewing an opinion of the Arizona Court of Appeals, the Supreme Court stated:

> Our task is to determine what the *opinion* actually said as determined by *its* language, not what the Court of Appeals intended to say, or meant, or by subsequent

> order says that it meant. Our decision, therefore, must come from the opinion and not from the subsequent order.

106 Ariz. at 477, 478 P.2d at 101 (emphasis in original).

Furthermore, in at least ten decisions after *Watson*, the Arizona Supreme Court has in fact reaffirmed its prior decision that subsection (F), the mitigating factor section, was unconstitutional as written and that it severed this offending portion of the statute. The court's decisions in *State v. Arnett*, 125 Ariz. 201, 608 P.2d 778 (1980), and *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979), are representative.

In *State v. Arnett*, the court stated:

> Following *Lockett and Bell*, [*v. Ohio*, 438 U.S. 637 (1978)] supra, this court, in the case of *State v. Watson*, [citation omitted] *severed* that portion of the sentencing procedure which was constitutionally infirm and directed that in the future courts in the State of Arizona must consider any mitigating factor presented by the defendant before the imposition of the death penalty.

125 Ariz. at 202, 608 P.2d at 779 (emphasis added). Similarly, in *State v. Smith*, the court said:

> In July 1978, this Court held A.R.S. § 12-454(F), part of Arizona's death penalty statute, unconstitutional, because it limited a defendant's right to show mitigating circumstances. *State v. Watson*, [citation omitted]. We then went on to find this constitutionally infirm section of the statute *severable* and upheld the remaining portion of the statute.

123 Ariz. at 243, 599 P.2d at 199 (emphasis added). *See also State v. Tison*, 129 Ariz. 526, 541, 633 P.2d 335, 350 (1981) (rejecting contention that *Watson* "is unconstitutional because the mitigation provisions of the statute are not severable from the remainder of the statute"); *State v. Greenawalt*, 128 Ariz. 150, 174, 624 P.2d 828, 852, *cert. denied*, 102 S. Ct. 364 (1981) ("We have considered before appellant's claim that the death penalty statute was not sev-

erable and held otherwise."); [3] *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828, *cert. denied*, 449 U.S. 986 (1980) (rejecting contention that "*Watson* incorrectly decided that the unconstitutional parts of Arizona's death penalty procedure were severable from the remainder"); *State v. Carriger*, 123 Ariz. 335, 340, 599 P.2d 788, 793 (1979), *cert. denied*, 444 U.S. 1049 (1980) ("In *State v. Watson*, [citation omitted] we recognized the continuing constitutionality of A.R.S. § 13-454, holding only subsection (F) unconstitutional. We find *Watson* controlling.").

Since the decision of the court below does not follow these Arizona decisions, it is in conflict with the decisions of this Court requiring that it do so.

3. In the alternative, petitioners argued that the imposition of the death penalty upon any of the class members was in violation of the double jeopardy and ex post facto clauses of the Constitution. As a matter of constitutional law, common law, and statutory law, once the Arizona statute was declared unconstitutional the sentences of the class members automatically became life imprisonment. *People v. Hardy*, 76 Cal. App. 3d 441, 142 Cal. Rptr. 887, 890–91 (1978); 1973 Ariz. Sess. Laws ch. 138 § 10. The petitioners' "cases had progressed sufficiently far in the legal process as to be governed solely by the old statute, with the concomitant unconstitutionality of its death penalty provision." *Dobbert v. Florida*, 432 U.S. 282, 301 (1977). Their sentences could not then be aggravated by sentencing them to death without violating the double jeopardy clause.

A separate and distinct double jeopardy violation arises out of the fact that no member of the class was a party to the litigation which vacated their death sentences. As a result of *Watson*, the death penalty of each class member was vacated by *sua sponte* order of the Arizona Supreme Court and over the direct objection of

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[3] In addition to *Watson*, *State v. Jordan*, and *Arnett*, *supra*, the court cited as authority for this statement its decisions in *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067 (1980), *State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, *cert. denied*, 449 U.S. 913 (1980), *State v. Mata*, 125 Ariz. 233, 609 P.2d 48, *cert. denied*, 449 U.S. 938 (1980), and *State v. Evans*, 124 Ariz. 526, 606 P.2d 16, *cert. denied*, 449 U.S. 891 (1980).

several members of the class. *See State v. Ceja*, 126 Ariz. 35, 36, 612 P.2d 491, 492 (1980). The resentencing process proceeded only because the Arizona Supreme Court had by general order directed it, not because any of the class members had sought or invited that result.

We are thus dealing with the classic case of precisely what double jeopardy is intended to prevent: the state missing on the first swing and then, wholly on its own motion, taking a second swipe at the same defendant. As was stated in *Swisher v. Brady*, 438 U.S. 204 (1978), the double jeopardy protection means that one fair shot is enough. The state is forbidden a " 'second crack.' " *Id* at 215–16. The resentencing process is unconstitutional on this ground apart from any other consideration.

Additionally, sentencing to death those petitioners who were tried and sentenced prior to *Watson* violates the ex post facto clause of the Constitution. The Ninth Circuit Court of Appeals' reliance upon this Court's decision in *Dobbert* to reject this claim ignored the "critical" distinction made in *Dobbert* between capital defendants who had never been subjected to the old, unconstitutional law and those (as here) who were convicted and condemned under it, and then exposed to death again under a subsequent ex post facto regime. As such, the Ninth Circuit's decision is in conflict with

> the bulk of the lower court case law and the better-reasoned constitutional and common law analysis . . . that when a statute is invalidated on *Lockett* grounds, defendants tried and sentenced under the former, unconstitutional standard cannot be resentenced to death and can receive a maximum punishment of life imprisonment.

Hertz, Weisberg, *In Mitigation of the Penalty of Death:* Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Colum. L. Rev. 317, 364 (1981). *See, e.g., Commonwealth v. Story*, _____Pa. _____, 440 A.2d 488, 491 (1982) (quoting and distinguishing *Dobbert*, 432 U.S. at 301).

4. As Judge Adam's dissent demonstrates, the Ninth Circuit decision also conflicts with *Bullington v. Missouri*, 451 U.S. 430 (1981).

Petitioners were originally sentenced under the 1973 death penalty statute, which required the sentencing court to "return a special verdict setting forth its findings as to the existence or non-existence" of each of the statutorily specified aggravating circumstances. Ariz. Rev. Stat. § 13-454(C). Since the original sentences were invalid, all class members were resentenced as a result of *Watson*. The precise question presented is whether upon resentencing the sentencing court may constitutionally be allowed to find, and base a death sentence on, aggravating circumstances that the sentencer previously found did not exist. The majority opinion said yes. Judge Adams said no.

Judge Adams used the case of Jordan, a class member, as an example. When Jordan was originally sentenced, the only aggravating circumstances proved were based upon his prior convictions.[4] Upon resentencing, Jordan presented new evidence of mitigation. The state presented no new evidence.[5] Nevertheless, the same judge who presided at the original sentencing found two additional aggravating circumstances: namely, that the offense had been "heinous" and "for pecuniary gain." Thus the state was allowed to prove on resentencing what it had expressly failed to prove on the "first crack."

This result conflicts directly with *Bullington*. In *Bullington*, this Court extended double jeopardy protection to capital sentencing proceedings such as those conducted in Missouri and Arizona. In analyzing the Missouri sentencing proceedings, the Court expressed its agreement with the dissent in the court below that

> the sentence of life imprisonment which petitioner re-

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[4] The special verdict for the original sentencing is attached hereto as Appendix L.

[5] The special verdict for the resentencing is attached hereto as Appendix M. Unlike the Federal courts here, the state trial court had no trouble "recogniz[ing] that . . . *State v. Watson*, . . . has held A.R.S. Section 13-454(f) unconstitutional . . . . This Court also recognizes, however, that the Court in *Watson* also held the unconstitutional portion of the statute to be severable . . . ." Appendix M at page 99a.

> ceived at his first trial meant that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence."

451 U.S. at 445.

As noted by Judge Adams, "the Arizona death sentencing scheme is quite similar to the Missouri procedure in the respects emphasized in *Bullington*." 667 F.2d at 1267 n.3. Under both Missouri's and Arizona's death penalty schemes, a separate, adversarial hearing determines the defendant's sentence. Under both systems, the prosecutor has the burden of proving beyond a reasonable doubt the existence of certain aggravating circumstances. *Id. Bullington* held that a prosecutor who fails to prove an aggravating circumstance initially may not be given a second chance.

Although these petitioners were initially sentenced to death, the *Bullington* rationale is equally applicable, if not more so. *Id.* Petitioners' death sentences rested upon the specific aggravating circumstances then proved. They were, by statute and in fact, explicitly acquitted of any aggravating circumstances not found by the sentencing court. For that reason, the *Bullington* rationale precludes the state from seeking to prove additional aggravating circumstances upon resentencing.

For the reasons set forth by Judge Adams, the case at a minimum should be remanded to determine whether, and in which cases, these Arizona procedures violated the double jeopardy clause.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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